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CASE NO. 82–1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHASE FOUNDRY & MANUFACTURING CO.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES SUPREME COURT HAS JURISDICTION TO CONSIDER FEDERAL QUESTIONS WHICH WERE NEITHER RAISED NOR DECIDED IN THE STATE COURTS BELOW.

2. WHETHER THE SEPARATION OF POWERS DOCTRINE OF THE UNITED STATES CONSTITUTION APPLIES TO THE STATES, AND IF SO, WHETHER A STATE STATUTE REQUIRING A STATE COURT TO HALT VIOLATIONS OF STATE LAW CONTRAVENES THE REQUIREMENT FOR SEPARATION OF POWERS.

3. WHETHER A STATE STATUTE REQUIRING A STATE COURT TO ISSUE AN INJUNCTION TO HALT VIOLATIONS OF STATE LAW CONTRAVENES THE PRINCIPLES OF DUE PROCESS.

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JURISDICTION

Because the federal questions presented in the petition were not raised or described in the state courts below, the Court has no jurisidction over this matter. See Part I of Reasons Why The Writ Should Be Denied, *infra*, page 8.

STATEMENT OF THE CASE

Petitioner Chase Foundry & Manufacturing Co. ("Chase Foundry" or "Chase") has devoted a considerable portion of its petition to a highly misleading argument on the facts, almost to the exclusion of any discussion of the law. Throughout the history of this litigation before the state courts and now before the Supreme Court, Chase Foundry has repeatedly attacked the Ohio Environmental Protection Agency ("Ohio EPA") in hopes of putting the Agency on trial and diverting attention from its indefensible violations of law. The state Court of Appeals and the Ohio Supreme Court saw through this tactic and ruled against the company. Because most of the factual allegations of Petitioner are irrelevant to the legal issues raised in the petition, Respondent will not attempt to correct all of the factual misstatements made in the petition, but will merely address those most important to an understanding of the legal issues involved.

Unlike most of the foundries in the state of Ohio, Petitioner Chase Foundry & Manufacturing Co. has refused to comply with the state air pollution laws designed to protect the health of the people of Ohio. The history of this corporation's noncompliance began more than ten years ago when Ohio's air pollution control program was formulated. In April of 1973 Chase Foundry was notified that the cupola (blast furnace) at its Columbus plant was emitting pollutants into the air at a rate in excess of that allowed by Ohio air pollution rules. On June 8, 1974, the Ohio environmental protection Agency ("Ohio EPA") issued Chase a variance*

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*As the Court of Appeals for Franklin County explained in its opinion below, a variance is a temporary exemption from Ohio air pollution rules

allowing the company more than a year to comply with the rule.** After the corporation failed to meet the deadline for compliance in its variance, Ohio EPA in March of 1976 suggested that Chase Foundry file an application for another variance in order to obtain another extension of time, allowing the company until April 15, 1977 to comply.

Chase Foundry, however, did not file the variance application, resulting in a strongly worded letter from the Director of Ohio EPA to the company informing Chase that further non-compliance would not be tolerated. A second letter from the Director to the company followed on January 31, 1978. Chase Foundry's President responded by writing his Congressman and arranging meetings with the Governor.

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* *contd.*

granted substantially as a matter of grace by the Director of Ohio EPA to a polluter who has shown excusable hardship or who has demonstrated that he needs additional time to comply with clean air requirements. A variance is a substitute for a permit to operate, which can be obtained only when the permittee complies with the air pollution laws, and without which a person cannot legally emit pollutants into the air. See the Court's opinion found in the Appendix to Chase Foundry's Petition, pages A-14 and A-15. Contrary to the bold assertions in the Petition, most of Ohio's industries comply with Ohio air pollution laws and as a result possess permits to operate, not variances.

**During this time, Paul Smith, the president of Chase Foundry, told Ohio EPA that he was considering the installation of a device known as a "wetcap," a device cheaper than most alternative air pollution control equipment. When informed by Ohio EPA that this device in the past had sometimes been ineffective to adequately control air pollutants, Mr. Smith offered to install the wetcap at the foundry if Ohio EPA would guarantee to issue Chase Foundry a permit or variance even if the wetcap was not effective. When Ohio EPA insisted that Chase Foundry, like its competitors in the foundry business, install effective equipment, the company abandoned any plans it might have had to install control equipment.

That course of action by Chase Foundry resulted in a series of negotiating sessions between Chase Foundry and the Ohio EPA held for the purpose of providing the company with yet additional time to comply with Ohio's air pollution requirements. These discussions culminated in the issuance of negotiated administrative findings and orders on August 7, 1978, which postponed Chase Foundry's compliance date to July 1, 1979. Due to the company's prior history of footdragging, Ohio EPA feared that Chase would pursue administrative appeals of the very same orders the company had negotiated, thus tying up the orders in litigation and delaying the company's ultimate compliance for a time period longer than the year specified in the orders. As a result, Ohio EPA required Chase to waive judicial review of the orders in exchange for the additional grace period.

Following receipt of the orders, Chase Foundry did not contact the Ohio EPA until January of 1979, when its president "painfully reported" to the Ohio EPA that his company was not in compliance with the schedule provided in the orders, blaming labor problems and adverse economic conditions. Chase Foundry's cry of economic woe, however, was not supported by the company's own 1978 balance sheet, which showed that the company had increased sales and dividends over the previous year, with a profit of $100,006.00, a cash balance of $74,749.00, retained earnings of over $666,000, and no long or short term debt.

In response to Chase Foundry's continued violation of the administrative orders and applicable air pollution control rules, the Ohio EPA referred the matter to the Ohio Attorney General's Office for legal action. Following this referral, Chase Foundry wrote to the Ohio EPA

admitting that it had failed to meet the compliance deadline set forth in the administrative orders, again citing cost as the reason for its non-compliance.

As before, defendant's pleas of poverty were unsupported by its balance sheet for fiscal year 1979, which showed profits of $90,347, dividends of $44,000, increased retained earnings of $712, 563, and no long or short term debt. The cost of compliance with the administrative orders, on the other hand, ranged from $53,000 to $100,000 for installation of acceptable pollution control equipment, or $85,000 to $110,000 to replace the cupola with an electric induction furnace.

Chase Foundry's real problem with installing air pollution control equipment, as Paul Smith stated in 1980, is the fact that it is non-productive capital equipment. Parke Smith, the company's vice-president, espoused the same view during his deposition in the proceedings before the state courts, as evidenced by the following illuminating exchange:

"Mr. Van Kley: And what are the reasons for not buying electric induction furnaces?

Mr. Smith: I would say that the primary reason that we are not convinced that, cost-wise, it's an appropriate thing for our company to do at the present time.

Mr. Van Kley: Any why not?

Mr. Smith: Well, because it would cost too much money.

Mr. Van Kley: Okay. Why don't you explain to us what you mean by your statement that, "It would cost too much money?"

Mr. Smith: We don't feel that it would be an appropriate return on our investment, we would receive an appropriate return on our investment.

Mr. Van Kley: Is that the only reason?

Mr. Smith: Yes."

Transcript of Deposition of Parke E. Smith, p. 8

Chase's attitude toward pollution control comes through clearly in the above discourse: the company will control its pollution only when it can make a profit on it.*

The State of Ohio filed a civil lawsuit in the Franklin County, Ohio, Court of Common Pleas against Chase Foundry during September of 1979, requesting an injunction against the illegal operation of the cupola until such time as air pollution controls were installed. Rather than seeking to comply with the Ohio air pollution statutes, Chase Foundry responded to the lawsuit by

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*Chase Foundry has continued its tale of econmic woe in its petition to this Court, contending that it has never had money adequate to buy control equipment. Several of the annual income figures presented in Petitioner's Statement of Facts, including the alleged 1982 operating loss, were never presented to the trial court below, nor were they supplied to the State in discovery.

applying for a variance, asking that it be totally excused from compliance with the laws.*

In March of 1982, in response to cross motions for summary judgment by the State and Chase Foundry, the Court of Common Pleas granted summary judgment to Chase Foundry on all six courts of the complaint, even though Chase had not requested summary judgment on two of the counts.

The State appealed the trial court's decision to the Franklin County, Ohio, Court of Appeals. The Court of Appeals reversed the trial court's judgment on Count Six of the complaint, which charged Chase Foundry with operating the cupola, an air contaminant source, without a permit to operate. The Court of Appeals ordered the trial court to grant summary judgment to the State on

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*This application contained none of the information necessary to tell whether the company could be legally given a variance, and was returned as incomplete. Chase Foundry has argued that it should be given a variance and be excused from air pollution laws because the air quality in Columbus has improved during the time Chase Foundry has been illegally polluting. In other words, Chase Foundry believes that is should be rewarded for ten years of defiance against state laws while other manufacturers have performed their duties to clean the air.

Chase Foundry has also threatened that it could operate its cupola more often if it is required to install controls, thus increasing the total amount of emissions while decreasing the rate of emission. To accept this argument, one must assume that Chase Foundry, perhaps overcome by some altruistic desire for clean air, presently limits its cupola's operating time to hold down its air contaminant emissions. If forced to comply with the law, the company will not be so inclined. In fact, however, Chase's hours of operation are limited by the nature of its business.

that count, since Chase had admitted in its answer that it was operating the cupola without a permit to operate.*

The appellate court also held that under Section 3704.06(B) of the Ohio Revised Code, state courts were required to enjoin illegal acts of air pollution, and had no discretion to excuse the violations through the exercise of their equity powers. The trial court was ordered to issue an injunction prohibiting the emission of contaminants from the cupola.

Chase Foundry filed a notice of appeal in the Ohio Supreme Court from the appellate court's decision on Count Six. The Ohio Supreme Court found that the company had presented no substantial constitutional questions to that court for review, and dismissed the appeal.

Chase Foundry now has petitioned this Court for a writ of certiorari, presenting this Court with two federal questions never raised or decided in the state courts below.

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*The Court of Appeals found that the three counts alleging violations of the orders had become moot. The appellate court reversed the trial court's judgment on the remaining two counts which were not the subject of summary judgment motions by either Chase or the State, and orderad the court to hear evidence on them. None of these five counts are involved in the petition to this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. BECAUSE THE FEDERAL QUESTIONS PRESENTED IN THE PETITION WERE NOT RAISED OR DECIDED IN THE STATE COURTS BELOW, THIS COURT HAS NO JURISDICTION TO CONSIDER THESE ISSUES.

This Court has repeatedly ruled that it has no jurisdiction to consider federal questions presented by petitions for writs of certiorari to state courts where such questions have not been previously presented to or decided by the state courts. *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S. Ct. 1161, 1162-63, 22 L. Ed. 2d 398 (1969). Besides honoring the jurisdictional bar to granting writs under such circumstances, the Court has also noted that petitions containing federal questions not raised in state courts should be dismissed for several practical reasons as well. The record in such cases is not likely to be adequate to allow an informed decision to be made on the federal questions, since the parties did not litigate these issues below. 394 U.S., at 439 89 S. Ct., at 1163. In addition, because of its due regard for an appropriate relationship with the state courts, the Court has been especially careful not to pass on federal questions contesting the validity of state statutes where state courts have not first been given the opportunity to construe the statutes in a way that would save their validity or constitutionality. *Id.; Wilson v. Cook,* 327 U.S. 474, 483-84, 66 S. Ct. 663, 668, 90 L. Ed. 793 (1946). The petitioner to this Court has the burden of demonstrating that the federal questions were raised and decided in the state courts below. *Raley v. State of Ohio,* 360 U.S. 423, 435, 79 S. Ct. 1257, 1265, 3 L. Ed. 2d 1344 (1959).

Petitioner has presented two federal questions in its petition in hopes of persuading the Court to exercise jurisdiction over this case. The question concerning separation of powers between the executive and judicial branches of government (the second of Petitioner's "Questions Presented") was not raised or even mentioned in the state trial court, court of appeals, or supreme court. The propositions of law presented to the Ohio Supreme Court, attached to Chase Foundry's petition as appendix pages A-42 to A-44 in an apparent attempt to satisfy Petitioner's burden of showing that the federal questions were raised below, contains no reference to separation of powers. Nor did any of the state courts address a separation of powers issue in their decisions.

The first of Petitioner's "Questions Presented" alleges that Section 3704.06(B) of the Ohio Revised Code ("O.R.C."), which requires the issuance of an injunction against Chase Foundry's illegal operation of the cupola, is unconstitutional as a violation of due process. Although Chase Foundry in the Court of Common Pleas and Court of Appeals had charged that the issuance of the Findings and Orders violated due process (an issue which is now moot), the company did not contend that Ohio Revised Code Section 3704.06(B) was unconstitutional. In its memorandum seeking the jurisdiction of the Ohio Supreme Court, Chase Foundry argued for the first time that Ohio EPA's return of Chase's incomplete variance application violated due process, and reasoned that as a result, the issuance of an injunction for failure to have a permit to operate would also violate due process, because possession of a variance would have exempted the

company from permit requirements.* At no time did Petitioner challenge the constitutionality of O.R.C. Section 3704.06(B) in the state courts. The due process issue presented to this Court is entirely unrelated to the issue brought before the Ohio Supreme Court. Petitioner now asserts that the Ohio Legislature's restriction on the state courts' exercise of their equitable powers to excuse unlawful air pollution violates due process. The Court has ruled that it will not consider a federal constitutional issue such as this which has not previously been presented to the state courts below, even if the same clause of the constitution was involved in a different federal question which has been presented to the state courts. *Wilson v. Cook*, 327 U.S. at 483-84, 66 S. Ct., at 668. Because Petitioner's due process issue, as well as its separation of powers question, was not raised or decided in the Ohio state courts, Petitioner's request for a writ of certiorari should be dismissed or denied for lack of jurisdiction.

II. A STATE STATUTE REQUIRING A STATE COURT TO ISSUE AN INJUNCTION TO HALT VIOLATIONS OF STATE LAW DOES NOT CONTRAVENE THE PRINCIPLES OF DUE PROCESS.

This Court has often held that the Due Process Clause of the Fourteenth Amendment does not empower the courts to substitute their social and economic beliefs for the judgment of the legislative bodies elected to pass

*Like the Petition to this Court, Chase's Memorandum to the Ohio Supreme Court was almost devoid of discussion of constitutional issues. Chase Foundry's contention that the issuance of an injunction violates due process where a variance application was previously returned was "developed" only in a portion of one sentence in a thiry page memorandum.

the laws. *Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93 (1963). The judiciary is not entitled to label a statute unconstitutional just because it believes the statute to be unwise, but instead will uphold the law if it bears a reasonable relationship to a legitimate state interest. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213, 57 L. Ed. 2d 91 (1978).

There can be no doubt that air pollution laws are legitimate exercises of state police power which are consistent with the principles of due process. In *Northwestern Laundry v. City of Des Moines,* 239 U.S. 486, 36 S.Ct. 206, 60 L. Ed. 396 (1916), the Court responded to a due process challenge to a smoke law by declaring:

> So far as the Federal Constitution is concerned, we have no doubt that the state may. . .declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. *Nor is there any valid Federal Constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance.* [Emphasis added.] 239 U.S., at 491-92, 36 S.Ct., at 208.

See, also, *Hadacheck v. Sebastian,* 239 U.S. 394, 36 S.Ct. 143, 60 L. Ed. 348 (1915). Because air pollution laws have a rational basis for their enactment, i.e., the protection of the health of state citizens, they do not offend the principle of due process, even if compliance with these laws is expensive.*

The Court has also ruled that a state may vest other branches of government with powers ordinarily reserved for the judiciary without offending due process, holding:

> The objection that the act of 1899 [the state law in question] confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due process clause of the 14th Amendment.

Dreyer v. Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L. Ed. 79 (1902).

As the state courts in this case have ruled, Ohio Revised Code Section 3704.06(B) requires Ohio courts to enjoin illegal acts of air pollution. Because the Ohio legislature, after studying the air pollution problems of the state, decided that the illegal operation of polluting sources was contra to public policy, an Ohio court is not allowed to substitute its judgment for that of the legislature by allowing the pollution to continue. Because the rational basis for this statute is the safeguard of public health, it does not violate due process requirements. In addition, under this Court's holding in *Dreyer v. Illinois,*

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*This Court has also recognized that states are authorized by the federal Clean Air Act to promulgate air pollution rules without considering the economic or technical feasibility of complying with the rules. *Union Electric Co. v. EPA,* 427 U.S. 246, 96 S.Ct. 2518, 49 L. Ed. 2d 474 (1976).

supra, O.R.C. 3704.06(B) is not inconsistent with due process merely because the Ohio legislature has made determinations of public policy usually made by state courts pursuant to their equity powers.

Because Petitioner's petition is almost devoid of any discussion of constitutional law, it is difficult to determine the basis for Petitioner's allegation that O.R.C. 3704.06(B) violates due process. Apparently Chase Foundry is attempting to convince the Court that the Ohio legislature cannot constitutionally make the judgment that in cases where harmful air pollution is occurring, the equities favor the discontinuation of the pollution, rather than leaving state courts with the discretion to excuse the violation. However, under *Dreyer v. Illinois, supra,* allowing another branch of state government to exercise functions ordinarily exercised by the judiciary does not offend due process. Furthermore, while the evidence shows that Chase Foundry could afford control equipment (the company was especially financially healthy during the time the findings and orders required the purchase of control equipment), even if the company were found to discontinue operations as a result of a court order prohibiting pollution pursuant to O.R.C. 3704.06(B), the principles of due process would not be offended. *Northwestern Laundry,* 239 U.S., at 491-92, 36 S.Ct., at 208; *Hadacheck,* 239 U.S., at 407-10, 36 S.Ct., at 143-44. Petitioner's due process contention, therefore, is obviously meritless and not worthy of this Court's consideration.

III. A STATE STATUTE REQUIRING A STATE COURT TO ISSUE AN INJUNCTION TO HALT VIOLATIONS OF STATE LAW DOES NOT CONTRAVENE THE DOCTRINE OF SEPARATION OF POWERS.

A. THE DOCTRINE OF SEPARATION OF POWERS IN THE UNITED STATES CONSTITUTION IS NOT APPLICABLE TO STATE GOVERNMENTS.

In *Sweezy v. State of New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L. Ed. 2d 1311 (1957), this Court ruled:

> [T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.

354 U.S., at 255, 77 S.Ct., at 1214.

See also, *Dreyer v. Illinois,* 187 U.S. 71, 83-84, 23 S.Ct. 28, 32, 47 L.Ed. 79 (1902).

Because the federal separation of powers doctrine does not apply to state governments, Petitioner's argument that the Ohio legislature's enactment of O.R.C. 3704.06(B) unconstitutionally restricts the Ohio judiciary is meritless.

B. EVEN IF THE SEPARATION OF POWERS DOCTRINE APPLIED TO STATE GOVERNMENTS, O.R.C. 3704.06(B) WOULD NOT VIOLATE THAT DOCTRINE.

Even under federal law, the legislative branch of government may validly regulate and restrict the remedial powers of the judiciary. In *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), for example, this Court listed seven federal statutes limiting the injunctive powers of federal courts, while making no indication that the statutes were invalid in any respect, 321 U.S., at 442, n. 8, 24 S. Ct., at 676, n. 8.

Neither of the two cases cited in Chase Foundry's petition provided any indication that legislatures cannot constitutionally limit the equitable discretion of the courts to enforce statutes or to refuse to enforce them. The cases cited by Petitioner were simply matters of statutory interpretation--the Court found that the statutes construed in these cases simply were not intended by Congress to limit the courts' equitable discretion. Petitioner's discussion of these decisions thus was not even relevant to constitutional issues, but addressed totally unrelated matters of federal statutory construction.

The cases cited by Petitioner, although not specifically addressing constitutional issues, acknowledged that Congress could have required the courts to enjoin violations of the statutes in question without considering equities. In *Hecht v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L. Ed. 754 (1944), the Court stated:

> [I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.

321 U.S., at 330, 64 S.Ct., at 592. And in *Weinberger v. Romero-Barcelo,* _____U.S._____, 102 S.Ct. 1798, 72 L. Ed. 2d 91 (1982), the Court explained:

> Of course, Congress may intervene and guide or control the exercise of the courts' discretion. . . .

102 S.Ct., at 1803. The Court continued to say that, in the statute construed by its previous decision in *TVA v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L. Ed. 2d 117 (1978), ". . .Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." 102 S.Ct., at 1804. Thus, the very cases cited by Petitioner demonstrate that even on the federal level, the legislative branch may limit the equitable discretion of the judiciary. Even if federal separation of powers principles applied to the states, state statutes such as O.R.C. 3704.06(B) could validly require state courts to enjoin illegal activities once those violations were proven. Petitioner thus has failed to show any conflict between the Supreme Court's decisions and the state court decisions in the case at bar. (See Rule 17.1 of the Supreme Court Rules, which describes the character of reasons that will be considered in reviews of petitions for certiorari.) Petitioner's separation of powers contention, therefore, is not deserving of this Court's attention.

CONCLUSION

Petitioner's application to this Court for a writ of certiorari is merely another of many delaying tactics Chase Foundry has used to postpone its ultimate compliance with Ohio air pollution laws, in utter disregard for the health and comfort of the Columbus citizens living near the plant. Petitioner's delay game is obvious, *inter alia,* from discussion in its petition concerning the incomplete variance application which was returned to Chase Foundry. Chase states that the variance application was submitted to Ohio EPA once, and promises to file another application, but begs the Court to force the state courts to delay injunctive relief so that the company can continue business as usual "for a reasonable time while it seeks to obtain a variance. . ." Petition, p. 47. This raises an interesting question. Since the incomplete variance was returned *over three years ago,* why has Chase not completed the application and resubmitted it yet? Presumably, Chase Foundry is saving this delay device until after the Supreme Court has disposed of this petition, when the company will file the application. Chase will then urge the state trial court to delay injunctive relief until the variance application has been processed and all appeals therefrom have been exhausted.

It is also instructive to note that, while there are references in the petition to Chase's intentions to avoid installation of control equipment in the future, nowhere has the company requested a delay in injunctive relief to allow more time to install equipment, even though the company, like its foundry competitors, possesses the financial ability to control its grievous air pollution. Obviously, Chase Foundry will not seriously consider that option until the day after the injunctive has been issued.

Because the federal questions presented by Chase Foundry to this Court were not raised or decided in the Ohio state courts below, this petition should be dismissed. In addition, because the due process and separation of powers questions are clearly meritless, even if the petition is not dismissed, it should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this brief in opposition of Respondent State of Ohio were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class, postage prepaid, this _____ day of _____, 1983, to C. William Brownfield, Brownfield, Bowen & Bally, 140 East Town Street, Columbus, Ohio 43215.

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